

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA MARIE HAMPTON : CIVIL ACTION
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 v. :
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 TOKAI FINANCIAL SERVICES INC. : NO. 98-5074

MEMORANDUM ORDER

Plaintiff has asserted claims against her former employer for a racially motivated and retaliatory discharge under Title VII, for racial discrimination under 42 U.S.C. § 1981, and for intentional and negligent infliction of emotional distress. Presently before the court is defendant's Partial Motion to Dismiss Plaintiff's Amended Complaint.

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex.

rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

The pertinent allegations in plaintiff's amended complaint are as follow. Plaintiff is an African-American. She was employed by defendant as the supervisor of its accounting services department. Defendant experienced a problem with missing and forged checks. Plaintiff denied any personal involvement and cooperated with the investigation. Nevertheless, she was fired. Defendant's investigating agent told her she was fired because the forged checks were cashed in primarily African-American neighborhoods and it was therefore assumed that only African-American employees could have forged the checks. She and one other African-American employee were terminated. As a result of this action she became emotionally upset and requires medical attention.

Defendant argues that plaintiff's Title VII claims should be dismissed because she has not alleged that she filed an EEOC charge or obtained a right to sue letter. Before initiating a Title VII action a plaintiff must file a claim with the EEOC and receive a right to sue letter or allow 180 days to pass. See 42 U.S.C. § 2000e-5(f)(1); Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989) (plaintiff may bring suit only after obtaining right to sue letter); Trevion-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874, 878 (3d Cir. 1990) ("Federal courts

lack jurisdiction to hear Title VII claims unless a claim was previously filed with the EEOC").

Plaintiff states in her brief that she filed a timely complaint with the Pennsylvania Human Relations Commission ("PHRC") on October 22, 1998. Pursuant to a workshare agreement between the EEOC and the PHRC, a plaintiff can file with one and request that the claim be cross-filed with the other. See Berkoski v. Ashland Regional Med. Ctr., 951 F. Supp. 544, 549 (M.D. Pa. 1997) ("the PHRC and the EEOC have designated each other as agents 'for the purposes of receiving and drafting charges'"). The pleadings, however, contain no averment that plaintiff has filed with either the PHRC or the EEOC, and plaintiff has appended or otherwise presented no evidence that she did. Moreover, plaintiff does not even suggest that she has received a right to sue letter and, if calculated from October 22, 1998, the 180 day period has yet to lapse.

Defendant argues that plaintiff has also failed to state a claim for retaliatory discharge. To sustain a retaliation claim, a plaintiff must show that she engaged in protected activity, that her employer took an adverse employment action against her and that a causal link exists between the protected activity and the adverse action. EEOC v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998). Protected activity consists of opposition to

conduct prohibited by Title VII or participation in an investigation of or proceeding regarding such conduct. See 42 U.S.C. § 2000e-3(a); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997) (grievances about working conditions not protected activity when they do not concern acts made unlawful by Title VII), cert. denied, 118 S. Ct. 1516 (1998); Sumner v. United States Postal Service, 899 F.2d 203, 208 (2d Cir. 1990) (Title VII "prohibits employers from firing workers in retaliation for their opposing discriminatory employment practices").

Plaintiff has not alleged that she acted to oppose any discriminatory employment practice or engaged in any investigation of or proceeding regarding such a practice. There is no indication from the pleadings that she engaged in any protected activity.

Defendant contends that the emotional distress claims are barred by the Pennsylvania Workmen's Compensation Act ("WCA"). The WCA is the exclusive source of an employer's liability for covered injuries. See 77 P.S. § 481(a). The Act encompasses any "injury arising in the course of employment" including injuries resulting from intentional torts. Poyser v. Newman & Co., 522 A.2d 548, 550 (Pa. 1987). The statute, however, excludes from coverage an injury intentionally caused by a third party motivated by factors personal to the victim.

The pertinent inquiry is whether the attack causing the injury arose out of "personal or business related animosity." See Shaffer v. Proctor & Gamble, 604 A.2d 289, 292 (Pa. Super. 1992).

Courts have generally held that claims for intentional infliction of emotional distress resulting from employment discrimination are barred by the WCA. See, e.g., Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) (WCA bars emotional distress claim stemming from disability discrimination); Hicks v. Arthur, 843 F. Supp. 949, 958 (E.D. Pa. 1994)(racial discrimination); Gilmore v. Manpower, Inc., 789 F. Supp. 197, 197 (W.D. Pa. 1992) (age discrimination); James v. IBM, 737 F. Supp. 1420, 1427 (E.D. Pa. 1990) (sex and race discrimination). A claim for negligent infliction of emotional distress is clearly outside the third-party intentional attack exclusion and is barred by the WCA. See, e.g., Matczak, 136 F.3d at 940 (WCA bars claims for negligent infliction of emotional distress arising out of an employment relationship); Mulligan v. United Parcel Serv. Inc., 1995 WL 695097, at *2 (E.D. Pa. Nov. 16, 1995) (same).

Moreover, defendant correctly contends that plaintiff has not stated a cognizable claim for intentional infliction of emotional distress. To maintain a claim for intentional infliction of emotional distress, a plaintiff must show extreme and outrageous conduct which is deliberate or reckless and which

causes severe emotional distress. See Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988), appeal after remand, 894 F.2d 647 (3d Cir. 1990), cert. denied, 498 U.S. 811 (1990); Bedford v. Southeastern Pa. Trans. Auth., 867 F. Supp. 288, 297 (E.D. Pa. 1994); Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 991 (Pa. 1987). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989); Bedford, 867 F. Supp. at 297; Kazatsky, 527 A.2d at 991; Daughen v. Fox, 539 A.2d 858, 861 (Pa. Super. Ct. 1988), appeal denied, 553 A.2d 967 (Pa. 1988). See also Rowe v. Marder, 750 F. Supp. 718, 726 (W.D. Pa. 1990) (noting cause of action limited to acts of extreme "abomination"), aff'd, 935 F.2d 1282 (3d Cir. 1991).

Conduct in the employment context will rarely rise to the level of outrageousness necessary to support an intentional infliction of emotional distress claim. Cox, 861 F.2d at 390 (holding ill-motivated or callous termination of employment insufficient). While reprehensible, employment discrimination does not support an intentional infliction of emotional distress claim under applicable case law. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (sexual harassment of employee insufficient); Nichols v. Acme Markets,

Inc., 712 F. Supp. 488, (E.D. Pa. 1989); Coney v. Pepsi Cola Bottling Co., 1997 WL 299434, at *1 (E.D. Pa. May 29, 1997) ("highly provocative racial slurs and other discriminatory incidents do not amount to actionable outrageous conduct") EEOC v. Chestnut Hill Hosp., 874 F. Supp. 92, 96 (E.D. Pa. 1995) (racial discrimination); Parker v. DPCE, Inc., 1992 WL 501273, at *14 (E.D. Pa. Nov. 3, 1992) (dismissing claim for intentional infliction of emotional distress arising from racially discriminatory termination and retaliation).

ACCORDINGLY, this day of February, 1999, upon consideration of defendant's Partial Motion to Dismiss Plaintiff's Amended Complaint (Doc. #5), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that plaintiff's Title VII and emotional distress claims are **DISMISSED**, without prejudice to reassert a Title VII discriminatory discharge claim if plaintiff can accurately allege that she has filed a timely administrative charge and satisfied the EEOC exhaustion requirements.

BY THE COURT:

JAY C. WALDMAN, J.